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No. 93-5209

In The

Supreme Court of the United States

October Term, 1993

DARREN J. CUSTIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

JAMES K. BREDAR
Federal Public Defender

*MARY M. FRENCH
BETH M. FARBER
Assistant Federal Public Defenders

MARTIN G. BAHL
Staff Attorney

Office of the Federal Public Defender
for the District of Maryland
Equitable Bank Center, Tower II
Suite 401
100 S. Charles Street
Baltimore, Maryland 21201
(410) 962-3962

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

1. The ACCA does not limit consideration of federal constitutional challenges.

Respondent argues that the language of the ACCA "does not authorize" constitutional challenges when prior convictions are offered as grounds for the statutory minimum fifteen-year sentence. Resp. Br. 15-16. Respondent concedes, however, that "the Due Process Clause bar[s] the government from using the simple fact of conviction as a basis for sentence enhancement" if the prior convictions were "obtained without the basic elements necessary to a reliable judgment." Resp. Br. 16. Thus, even under respondent's view, the ambiguity of statutory silence must be interpreted as allowing some challenges in order to avoid creating a constitutional defect in the ACCA itself. The absence of express statutory authorization therefore proves nothing.

a. Ignoring the fact that its own argument requires consideration of some constitutional challenges, respondent claims that under *Lewis v. United States*, 445 U.S. 55 (1980), the absence of an express statutory authorization should be read as foreclosing such challenges. Resp. Br. 14-15. *Lewis* held that an uncounseled conviction could properly serve as a basis for a regulatory prohibition against possession of firearms by a felon under 18 U.S.C. App. § 1202(a)(1), the predecessor statute to Section 922(g)(1).[1] In so holding, the Court reaffirmed *United States v. Tucker*, 404 U.S. 443, 448-49 (1972) and *Burgett v. Texas*, 389 U.S. 109, 115 (1967), which established that unconstitutional convictions cannot be used as a basis for sentencing enhancement. *Lewis*, 445 U.S. at 67. *See* Pet. Br.

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[1] The very challenge this Court held could not be asserted in *Lewis* is one that respondent acknowledges in this case *must* be permitted under the ACCA. Resp. Br. 20.

12-13. The reasoning of *Burgett* and *Tucker* was inapplicable, the Court explained, because Congress' regulatory purpose in prohibiting possession of firearms by a felon focuses "not on reliability, but on the mere fact of conviction, or even indictment," and because Section 1202(a) created a firearms disability, not a sentencing enhancement scheme. *Lewis*, 445 U.S. at 67.[2] Given that the Court expressly distinguished the regulatory prohibition in *Lewis* from sentencing enhancements like the one in this case, respondent's reliance on *Lewis* is misplaced.[3]

b. Finding nothing in the statute forbidding constitutional challenges, respondent relies exclusively on a negative implication from 18 U.S.C. § 921(a)(20), which states that "[a]ny conviction which has been expunged, or

[2] Congress enacted Section 1202(a) and its companion legislation to keep firearms away from potentially dangerous persons, and therefore made the mere pendency of indictment a disabling circumstance, even if the defendant was never convicted. *Lewis*, 445 U.S. at 67. It logically followed that the more significant fact of conviction was "a sufficient basis on which to prohibit possession of a firearm," whether the conviction was valid or not. *Id.* at 66. Under current law, a person under indictment continues to be prohibited from possessing firearms. 18 U.S.C. § 922(n). Indictment does not, however, trigger the mandatory minimum sentence under Section 924(e).

[3] Contrary to respondent's claim (Resp. Br. 15-16), there is textual support for the different meanings of the term "convicted" in Section 922(g)(1) and the term "convictions" in Section 924(e). Section 924(e)(2)(C) expressly provides that the term "conviction" includes certain acts of juvenile delinquency; no similar language applies to Section 922(g). In any event, the terms have different meanings under respondent's own position, as some constitutional errors would defeat application of Section 924(e), but not Section 922(g)(1). Moreover, unlike in sentencing enhancement schemes, the firearms disability "attaches immediately upon the defendant's first conviction." *Lewis*, 445 U.S. at 67.

set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter." Respondent interprets this language to mean that convictions which have not been set aside can be counted. Resp. Br. 13. Respondent apparently believes that Congress added the sentence it relies on *solely* for a negative implication. When that sentence was added in 1986, there was no dispute that convictions previously vacated or reversed on federal constitutional grounds could not be used for sentencing enhancement. Thus, respondent interprets the provision as a completely superfluous exemption enacted solely to signal Congress' unspoken intent that prior convictions *not* previously set aside *could* be counted. In light of the settled law and established practice of allowing constitutional challenges at sentencing enhancement proceedings (Pet. Br. 19), this Court should not assume that Congress would strain so hard to avoid saying what it meant. Had Congress intended to abrogate the widespread federal law and practice, it would have made that intent express.

Respondent's supposition that Congress used the phrase "conviction which has been * * * set aside" to refer to convictions previously vacated or reversed on federal constitutional grounds is incorrect. The term "set aside" has a different meaning: "A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law." United States Sentencing Commission, *Guidelines Manual*, § 4A1.2, comment. (n.10) (Nov. 1993). It is far more likely that Congress intended the term "set aside" to refer to such procedures.[4] Alternatively, Congress may have

[4] For example, the now-repealed Federal Youth Corrections Act provided for setting aside convictions for reasons unrelated

intended the phrase "has been set aside" to forbid counting of state-court convictions previously invalidated on state-law grounds. When Section 921(a)(20) was enacted, *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 122 (1983), and *Thrall v. Wolfe*, 503 F.2d 313, 316 (7th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975), could be read as implying that such convictions might be counted.

Respondent offers no answer to the clear legislative history showing that Section 921(a)(20) was enacted in 1986 for the specific purpose of abrogating *Dickerson* and *Thrall* by requiring federal courts to follow state law in excluding certain state convictions from consideration. *See* Pet. Br. 22-23. Thus, the language on which respondent relies was included to *narrow*, not enlarge, what qualifies as a conviction. That purpose is inconsistent with respondent's argument that the provision broadened the penalty provision in Section 924(e).[5]

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to errors of law. *See* 18 U.S.C. § 5021(a) & (b) (conviction automatically set aside when offender discharged before expiration of maximum sentence or discharged from probation prior to expiration of maximum period of probation) (repealed). Similar procedures are provided under some state statutes. *E.g.*, Cal. Penal Code § 1203.4 (1993); D.C. Code Ann. § 24-806 (1993); Minn. Stat. Ann. § 242.31 (1993).

[5] If the Court finds that the term "convictions" is ambiguous after resort to the language, structure, and legislative history of the ACCA, then the rule of lenity should be applied. *Bifulco v. United States*, 447 U.S. 381, 387 (1980). When two alternatives are possible in the construction of a criminal statute, the rule of lenity provides that the Court will not choose the harsher alternative unless Congress made its intent apparent through use of "language that is clear and definite." *Dowling v. United States*, 473 U.S. 207, 214 (1985) (citation omitted).

2. The structural defect test is not a threshold test for federal constitutional challenges.

Rather than attempting to defend the test adopted by the court of appeals, respondent offers its own standard for evaluating whether claims of constitutional violations should be heard by federal sentencing courts.[6] According to respondent, use of a prior conviction as grounds for a mandatory minimum sentence is impermissible if the conviction is "void for all purposes because of a fundamental structural defect in the proceedings leading to the conviction." Resp. Br. 20. This proposal to limit constitutional review is untenable. This Court has never held in any context that only structural defects merit review, nor suggested that the structural defect test should be applied as a threshold test to bar consideration of entire categories of claims.

Respondent's argument is based on the supposition that the structural defect test identifies constitutional errors that undermine the reliability of a prior conviction. *See* Resp. Br. 16-17. That supposition is false. This Court adopted the structural defect test in *Arizona v. Fulminante*, 499 U.S. 279,

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[6] Contrary to respondent's argument (Resp. Br. 21 n.11), the structural defect test it proposes is not consistent with the opinion of the court of appeals in this case. As explained in a subsequent opinion of the court of appeals, the "test" announced in this case permits review at most of *only* three constitutional violations: (1) complete denial of counsel, (2) adjudication by a biased judge; and (3) direction of a guilty verdict by the court. *United States v. Bradshaw*, 999 F.2d 798, 800 (4th Cir. 1993), *petition for cert. filed*, (October 21, 1993) (No. 93-6448). Structural defects are not limited to these three errors. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (identifying other errors that are structural in nature).

309-10 (1991), for a very different purpose: to identify constitutional errors that warrant automatic reversal of a conviction without application of harmless error analysis. To say that structural defects cannot be harmless does not, as respondent implies, establish that other constitutional violations have no bearing on the reliability of resulting convictions. It offends due process to require a federal court to count a prior conviction for enhancement that it finds is unreliable. A harmful error – whether structural or not – undermines the reliability of the resulting conviction and requires recognition for that reason. The government's concession that unreliable convictions may not be used to enhance a sentence (Resp. Br. 16) cannot logically be confined to those resulting from structural defects.

The suggestion that a limiting test such as structural error is necessary to stem the tide of constitutional challenges is in any event misguided. Under *Burgett v. Texas*, 389 U.S. 109, 114-115 (1967) and *United States v. Tucker*, 404 U.S. 443, 449 (1972), the use of state convictions resulting from federal constitutional violations is forbidden because it would erode the underlying constitutional right and force the accused in effect to suffer anew from the deprivation of that right.[7] The protections afforded

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[7] *See also Baldasar v. Illinois*, 446 U.S. 222 (1980) (per curiam) (uncounseled misdemeanor conviction may not be used to convert subsequent misdemeanor into felony with enhanced prison term). Although the increased prison sentence imposed in this case does not constitute an enlargement of the sentence for a prior offense, the five-fold increase in the sentence (from approximately three to four years without the ACCA enhancement to nearly twenty years as a result of the ACCA) was imposed as a direct consequence of that conviction. Use of the prior conviction resulted in a completely different range of sentencing options, eliminating the statutory *maximum* of ten years and requiring a statutory *minimum* of fifteen years. Thus, the 235 month sentence Mr. Custis actually received would not

defendants under the Bill of Rights apply to the states by incorporation only if the right in question "is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Tempered by considerations of reliability, harmless error analysis, assignment of the burden of proof to the defendant, and the considerable latitude given to district courts handling ACCA proceedings, the requirement that the challenge be based on a federal constitutional right that applies to the states is sufficient in itself to screen unworthy claims.

Contrary to respondent's assertion, a decision in petitioner's favor would not require federal courts to entertain an unlimited array of claims, including "even state law challenges to prior state court convictions that are offered for use in federal sentencing proceedings." Resp. Br. 26. *Burgett* and *Tucker* limit use of convictions stemming from violations of federal constitutional rights. The logic of those cases extends no further.

3. Even if the structural defect test were appropriate, respondent's arguments would not defeat petitioner's claims.

a. Respondent acknowledges that a conviction obtained in violation of the right to counsel is a structural error which "so profoundly undermines confidence in the reliability of a criminal judgment" that it may not be used for enhancement purposes. Resp. Br. 20. Nevertheless, respondent contends that convictions obtained in violation of the right to effective assistance of counsel should automatically count for sentencing enhancement. Resp. Br. 30-31. That contention ignores the law governing the

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have been authorized but for counting the prior conviction for enhancement.

right to effective assistance of counsel and must, therefore, fail.[8]

Violation of the right to effective assistance of counsel fits squarely into the category of structural defects. Structural defects are defects in the "constitution of the trial mechanism." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Such defects require automatic reversal of the conviction because they "affect[] the framework within which the trial proceeds." *Id.* at 310. In contrast to structural defects, trial errors "occur[] during the presentation of the case to the jury" and can "be quantitatively assessed in the context of other evidence presented in order to determine" the effect on the trial. *Id.* at 307-308.

This Court has expressly recognized that an ineffective assistance claim "asserts the absence of one of the crucial assurances that the result of the proceeding is reliable * * * * " *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Ineffective assistance of counsel is established only if the conviction "resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687. "[C]ounsel's errors [must be] so serious as to deprive the defendant of a fair trial * * * * " *Id.*; *see also Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."). When

[8] Respondent argues that "the infrequency with which claims of ineffective assistance of counsel are found to have merit" shows that the district court need not consider any such claims. Resp. Br. 31. This attempt to distinguish ineffective assistance claims from *Gideon* claims based on their relative merit is flawed. Although it is true that only some ineffective assistance claims will have merit, the same is true of *Gideon* claims. *See* Pet. Br. 32.

attorney incompetence takes place during a guilty plea proceeding, the error is even more structural, because it deprives the defendant of a trial altogether. The defendant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). This constitutional error therefore affects not only the framework, but the entire nature of the proceeding.

In sum, because ineffective assistance of counsel upsets the adversarial system and renders the result unreliable, it "affect[s] the framework within which the trial proceeds" and is properly treated as a structural defect. Thus, even under respondent's test, the claim qualifies for review.

b. The acceptance of an unknowing and involuntary guilty plea is also a structural defect. A guilty plea constitutes a waiver of the very right to trial, and with it the right to a jury's determination of guilt after confrontation of adverse witnesses. *See Brady v. United States*, 397 U.S. 742, 748 (1970). It is axiomatic that such a waiver is valid only if it constitutes "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (plea cannot support a judgment of guilt unless it was voluntary and intelligent). If the "guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (citations omitted). *Accord Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969).[9]

[9] In this case, Custis not only asserted that *Boykin* was not satisfied; in addition, relying on a transcript showing that he was not advised of his defenses and was confused during the

Like other structural defects, it is impossible to assess the effect of an unknowing guilty plea "in the context of other evidence presented" in order to determine its effect. An unknowing and involuntary plea is not a trial error that "occur[s] during the presentation of the case to the jury." Such a plea not only denies a defendant basic trial protections, but prevents the conduct of a trial altogether. Therefore, under the analysis set forth in *Arizona v. Fulminante*, 499 U.S. at 307-10, an unknowing and involuntary plea is a "structural defect affecting the framework" of the proceeding and warrants review even under respondent's test. *Id.* at 310.

4. Challenges to prior convictions can be adjudicated fairly and efficiently.

Respondent argues that allowing constitutional challenges would "seriously undermine" the objectives of repeat offender schemes because convictions offered under the ACCA may be remote, and records and witnesses in the previous case may be unavailable. In such cases, respondent claims that the government would have difficulty "qualifying" the convictions for use in sentencing enhancement proceedings. Resp. Br. 23-24. What respondent ignores, however, is that the eight federal circuits which entertain constitutional challenges under the ACCA have uniformly placed the burden of proof on the

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proceeding, Custis asserted that his 1985 guilty plea "was not knowing and intelligent," that "he was unable to 'rationally weigh the advantages of going to trial against the advantages of pleading guilty,' " and that his guilty plea "did not represent 'a voluntary and intelligent choice among the alternative courses of action open to him.' " Def. Memo. 2/26/92, Docket No. 42, pp. 2 & 5, quoting *Brady*, 397 U.S. at 750; *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Respondent ignores this claim.

defendant. *See* cases cited in Pet. Br. at 39. As this Court recognized in *Parke v. Raley*, 113 S. Ct. 517, 524 (1992), "serious practical difficulties will confront [the] party assigned [the] evidentiary burden." If relevant evidence is unavailable, the defendant will be unable to satisfy his burden of proof and his constitutional challenge will fail.

Conceding that allocation of the burden of proof to the defendant provides "some degree of protection" to the government, respondent contends that defendants will simply testify to "some procedural irregularity" in the previous case, which will be difficult for the government to rebut. Resp. Br. 24 n.12. Respondent is unable to point to a single manifestation of this purported problem in the eight circuits that have allowed constitutional challenges since enactment of the ACCA in 1984.[10]

That failure is hardly surprising, for respondent's concerns are unfounded. As an initial matter, the court could refuse to entertain the defendant's challenge if his alleged "procedural irregularity" did not rise to the level of a federal constitutional violation. Moreover, even constitutional claims based solely on a defendant's uncorroborated, self-serving testimony would likely be decided against him. The finder of fact is entitled to wholly disbelieve the testimony of an interested witness, and this principle is frequently followed in ACCA proceedings.[11]

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[10] The same failure of the 20 amici states is similarly revealing, because 17 of them are in federal circuits that allow constitutional challenges to prior convictions offered for sentencing enhancement under the ACCA. Despite this fact, amici are unable to point to any instance in which federal court review of prior convictions has had any impact on them whatsoever.

[11] *E.g., United States v. Ferguson*, 935 F.2d 862, 866-67 (7th Cir. 1991) (defendant's affidavit insufficient to establish

Thus, a district court could quickly reject a defendant's claim under the circumstances imagined by respondent. In any event, the fact that relief should not be granted in the absence of a persuasive showing of a constitutional infirmity provides no reason to eliminate review in cases where such a showing is made.[12]

5. The presumption of regularity does not require imposition of a more severe sentence based on an unconstitutional conviction.

Respondent argues that the presumption of regularity supports automatic imposition of a mandatory minimum sentence, regardless of whether convictions may have been obtained in violation of the right to effective assistance of counsel and through unknowing and involuntary pleas. Resp. Br. 21-23. That argument is predicated in part on the assumption that a defendant asserting such a claim "could have but did not raise [the claim] on direct appeal or in a separate collateral proceeding." Resp. Br. 31. In Maryland, as elsewhere, a claim of ineffective assistance of counsel is not usually cognizable on direct appeal. *Johnson v. State*, 439 A.2d 542, 559 (Md. 1982);

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invalidity of convictions), *cert. denied*, 112 S. Ct. 907 (1992); *United States v. Gallman*, 907 F.2d 639, 643 (7th Cir. 1990) (discounting defendant's self-serving affidavit in course of rejecting claim), *cert. denied*, 499 U.S. 908 (1991); *United States v. Taylor*, 882 F.2d 1018, 1031 (6th Cir. 1989) (rejecting as "incredible" defendant's assertion that he did not understand waivers during plea proceeding), *cert. denied*, 496 U.S. 907 (1990).

[12] Nor do the difficulties imagined by the government exist in this case. The convictions challenged here were relatively recent and took place in Baltimore courts. J.A. 10, 43. Custis's claims were not based solely on his own testimony, but rather are supported by transcripts he submitted to the district court.

Kimmelman v. Morrison, 477 U.S. 365, 378 (1986) (no meaningful opportunity to raise ineffectiveness claims on direct review).[13] The same will often be true of a claim that a guilty plea was not knowingly and voluntarily made. *Ballentine v. State*, 445 A.2d 1033, 1036 (Md. 1982) (appellate record often insufficient to determine voluntariness of guilty plea). A post-conviction petition will not always furnish an alternative means of review, because courts refuse to consider such petitions unless the defendant is in custody or on probation or parole in connection with the conviction at issue. Md. Ann. Code art. 27, § 645A(a) (1992).[14]

In any event, respondent's argument is inconsistent with *Burgett* and *Tucker*, neither of which imposed any requirement that a defendant attack his conviction in state proceedings before he faces enhanced sentencing. In both cases, the Court held the use of the prior uncounseled convictions impermissible even though the defendant had not sought to have them overturned in the jurisdiction of conviction. *Burgett*, 389 U.S. at 112-113; *Tucker*, 404 U.S. at 444-45.

Moreover, respondent's argument fails to recognize that in the context of mandatory minimum sentencing under the ACCA, the defendant does not seek to overturn a prior conviction, but rather endeavors to present the court with information about the constitutional violations which led to the conviction. In so doing, the defendant

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[13] *See also People v. Montiel*, 855 P.2d 1277, 1294 (Cal. 1993); *People v. Crump*, 422 N.E.2d 815, 816 (N.Y. 1981); *Ramsey v. United States*, 569 A.2d 142, 146 (D.C. 1990).

[14] No such petition would have been allowed with respect to Custis's 1989 conviction for which he received a two-year suspended sentence. J.A. 47-48. Moreover, the time to challenge the prior convictions will normally have expired prior to the entry of a third conviction.

does not seek to overturn the state conviction, free himself from state custody, or otherwise interfere with the state's authority. *United States v. Paleo*, 967 F.2d 7, 12 (1st Cir. 1992) (rejecting exhaustion requirement in ACCA proceedings). Review of state court convictions in this limited context, with the burden of proof on the defendant, does not erode principles of finality.[15]

Respondent also asserts that allowing courts to consider constitutional challenges where a conviction was the product of an agreement to plead guilty would inequitably make a "defendant's good deal become[] even better." Resp. Br. 25. That argument wrongly assumes that the use of the prior conviction as a basis for a mandatory minimum sentence in the event of a subsequent conviction was a term of the plea agreement. The record contains nothing to suggest that petitioner agreed to any such term. The transcripts of petitioner's plea proceedings clearly show that he was not given notice

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[15] Respondent's reliance on *Parke v. Raley*, 113 S. Ct. 517 (1992) (Resp. Br. 22) is misplaced. In *Parke*, the Court explained that "the presumption of regularity that attaches to final judgments makes it appropriate to assign a burden of proof to the defendant." *Id.* at 524 (citation omitted). The Court did not rule, however, that the presumption of regularity is conclusive and irrebuttable. Instead, the Court approved a state sentencing enhancement scheme that permitted constitutional challenges to prior convictions but placed the burden of proving unconstitutionality on the defendant. This Court has never indicated that the presumption of regularity requires federal courts automatically to preclude entire categories of claims from consideration.

Respondent also claims that this Court held *Boykin's* protections inapplicable to collateral proceedings in *Parke*. Resp. Br. 32. This characterization is mistaken. In *Parke*, this Court declined to reach the government's argument that *Boykin* challenges need not be heard at all in sentencing enhancement proceedings. *Parke*, 113 S. Ct. at 522-23.

that the convictions could trigger a mandatory minimum fifteen-year sentence in the event of a subsequent conviction. J.A. 10-42, 43-48. Whether or not the prior conviction subsequently results in imposition of a mandatory minimum sentence, the advantages and disadvantages of the prior "deal" remain unchanged for both sides.

6. State historical tradition is not instructive.

Relying on *Medina v. California*, 112 S. Ct. 2572 (1992), respondent argues that there is no state historical tradition of reviewing constitutional infirmities in prior convictions used for sentencing enhancement and, therefore, that foreclosing such review does not violate due process. Resp. Br. 26-29. Respondent makes no attempt to reconcile this argument with *Burgett* and *Tucker*, or even its own structural defect test, all of which are inconsistent with respondent's argument.

Medina is simply inapplicable here.[16] Unlike the defendant in *Medina*, petitioner neither challenges state rules of criminal procedure nor relies solely on the general guarantee of due process. *Id.* at 2576. Rather, his claims are based on rights specifically enumerated in the Constitution, whose applicability to the states is settled.

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[16] In *Medina*, this Court rejected a challenge to California's procedural practices for determining competence to stand trial. In deciding whether the burden of proof scheme violated the Due Process Clause, the Court looked in part to whether it " 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Medina* 112 S. Ct. at 2577 (quoting *Patterson v. New York*, 432 U.S. 197, 201-202 (1977)). The Court also examined "the operation of the challenged rule, and our precedents," and evaluated "whether the rule transgresses any recognized principle of 'fundamental fairness' in operation." *Id.* at 2577-78.

Moreover, the absence of an historical tradition of considering challenges like petitioner's during sentencing enhancement proceedings is not instructive. The pertinent provisions of the Bill of Rights became applicable to the states in contemporary times,[17] after the state court decisions on which respondent relies. *See* Resp. Br. 27 n.13. That states did not permit challenges based on rights that were inapplicable to them shows only that there is no relevant historical practice to consider. *Cf. Medina*, 112 S. Ct. at 2582 (O'Connor and Souter, JJ., concurring). The logic of respondent's argument would allow nullification of a host of this Court's precedents decided over the last thirty years, including *Gideon* itself.[18]

In arguing (Resp. Br. 27-28) that there is no uniform contemporary practice regarding consideration of constitutional challenges, respondent omits any mention that courts in the First, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have uniformly permitted

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[17] The Sixth Amendment rights were made applicable to the States as follows: right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963); confrontation, *Pointer v. Texas*, 380 U.S. 400 (1965); compulsory process, *Washington v. Texas*, 388 U.S. 14 (1967); trial by jury in non-petty cases, *Duncan v. Louisiana*, 391 U.S. 145 (1968). The Fifth Amendment right against self-incrimination was applied to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964). *Burgett* and *Tucker* made clear that use of convictions obtained in violation of specific federal rights constitutes another violation of those rights and must be prevented so that the federal right is not eroded. *Burgett*, 109 U.S. at 114-15; *Tucker*, 404 U.S. at 449.

[18] At common law, the right to counsel was available in misdemeanor but not in felony cases. *Argersinger v. Hamlin*, 407 U.S. 25, 46 (1972) (Powell, J., concurring).

defendants to challenge the constitutionality of convictions offered for enhancement under the ACCA.[19] In addition, respondent fails to acknowledge that, following *Burgett* and *Tucker*, the lower federal courts entertained a variety of constitutional challenges to prior convictions offered for sentencing enhancement before adoption of the ACCA. Pet. Br. 19.[20]

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[19] *See* cases cited in Pet. Br. 13-14. Ignoring all cases under the statute at issue here, respondent focuses exclusively on cases governed by the provisions of the sentencing guidelines. Resp. Br. 28 n.15. In guidelines cases, the counting of an unconstitutional conviction can be cured by granting a downward departure on grounds that the defendant's criminal history category over-represents the seriousness of his criminal history or the likelihood that he will commit further crimes. United States Sentencing Commission, *Guidelines Manual*, § 4A1.3 (Nov. 1993). No similar amelioration is available under the ACCA. If a mandatory minimum sentence is required, the court is not permitted to depart below it. 18 U.S.C. § 3553(e) (no departure below mandatory minimum unless defendant provides substantial assistance in investigation and prosecution of others).

[20] Respondent notes that five states restrict review of prior convictions for sentencing enhancement, and two states permit challenges if the defendant makes a prima facie showing that one of the convictions was unconstitutional. Resp. Br. 28 n.14. The states that require a prima facie showing of unconstitutionality support Custis's position in this case. Many other states also allow constitutional challenges to prior convictions offered for sentencing enhancement. *See, e.g., People v. Sumstine*, 687 P.2d 904 (Cal. 1984); D.C. Code Ann. § 23-111(c)(2) (1993); *State v. Beloit*, 844 P.2d 18 (Ida. 1992); *Dunn v. Commonwealth*, 703 S.W.2d 874 (Ky. 1985), *cert. denied*, 479 U.S. 832 (1986); *State v. Shelton*, 621 So.2d 769 (La. 1993); *State v. O'Neil*, 580 P.2d 495 (N.M. App. 1978); *People v. Harris*, 459 N.E.2d 170 (N.Y. 1983); *State v. Branch*, 743 P.2d 1187 (Utah 1987), *cert. denied*, 485 U.S. 1036 (1988); *State v. Chervenell*, 662 P.2d 836 (Wash. 1983).

7. Respondent's arguments would keep relevant information from the sentencing court.

Respondent contends that because sentencing courts are permitted to consider a broad range of information, including prior misconduct for which a defendant was not prosecuted, it follows that a sentencer may rely on prior convictions to trigger a mandatory minimum sentence, even if they were obtained in violation of the right to effective assistance of counsel or through an unknowing and involuntary plea. Resp. Br. 19. Because respondent's position would ultimately restrict rather than broaden the sentencing inquiry, that argument betrays the very principles on which it is based.

Contrary to respondent's argument, the statutory mandate that "[n]o limitation shall be placed on the information * * * which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence" (18 U.S.C. § 3661), supports consideration of claims that prior convictions resulted from constitutional violations.[21] In *United States v. Tucker*, 404

[21] Respondent relies on *Williams v. New York*, 337 U.S. 241 (1949), *United States v. Dunnigan*, 113 S. Ct. 1111 (1993), and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), for the proposition that sentencing enhancements need not be "limited to prior convictions that the sentencing court certifies as valid." Resp. Br. 19. None of those cases suggests that sentencing courts should consider unconstitutional convictions. On the contrary, all focus on actual *conduct* of the defendant, as found by the sentencing court. *Williams*, 337 U.S. at 244 (uncharged burglaries); *Dunnigan*, 113 S. Ct. at 1118 (perjury at trial); *McMillan*, 477 U.S. at 81 (visible possession of firearm). Because the enhancement in those cases did not result from unconstitutional convictions, this Court's decisions in *Burgett* and *Tucker* were not implicated.

Permitting constitutional challenges is fully consistent with the broad-ranging consideration of a defendant's conduct

U.S. 443, 447 (1972), this Court explained that a sentence based in part on uncounseled convictions was "founded at least in part upon misinformation of constitutional magnitude." In this case, the government proposes to preclude the district court from considering information that prior convictions stem from similarly grave constitutional infirmities. Respondent's argument that the district court must ignore information directly relevant to the reliability of those convictions and the background of the defendant is inconsistent with the statutory prohibition against limitation of the information a sentencing court may receive and consider.

8. A remand is necessary to decide petitioner's claims.

Respondent mischaracterizes the record in contending that the district court "initially determined that the performance of petitioner's attorney in the 1985 case did not fall below the level of professional competence required under *Strickland*." Resp. Br. 6. The district court expressly ruled that counsel's performance "*could* constitute performance below the applicable standards of professional competence" under *Strickland*. Order, 2/27/92, Docket No. 46, p. 1 (emphasis added). The court withheld decision on the constitutionality of this conviction

approved in *Williams*, *Dunnigan*, and *McMillan*. A finding that the prior conviction is constitutionally invalid would not prevent the court from enhancing the defendant's sentence based on an independent finding that the defendant actually committed the underlying offense. If the court so found, the sentencing guidelines would permit an upward departure based on the conclusion that the defendant's criminal history score underrepresented the seriousness of his criminal history. United States Sentencing Commission, *Guidelines Manual*, §§ 4A1.2, Comment. (n. 6); 4A1.3 (Nov. 1993).

because it intended to hear testimony before deciding whether there was a reasonable probability that, but for counsel's errors, Custis would have insisted on a trial. *Id.* at 2. Prior to the sentencing hearing, the district court reversed its position, decided not to consider the claims at all, and refused to take evidence in support of them. Because neither court below made a final determination of the merits of Custis's claims, the merits of the claims are not before this Court. A remand is therefore required.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for resentencing.

Respectfully submitted,

JAMES K. BREDAR
Federal Public Defender

*MARY M. FRENCH
BETH M. FARBER
Assistant Federal Public Defenders

MARTIN G. BAHL
Staff Attorney

Office of the Federal Public Defender
for the District of Maryland
Equitable Bank Center Tower II
Suite 401
100 S. Charles Street
Baltimore, Maryland 21201
(410) 962-3962
Counsel of Record